BRB No. 06-0754 BLA

LINDA ANDERSON (Widow of GEROID ANDERSON)	)	
Claimant-Respondent	)	
v.	)	
APPLETON & RATLIFF COAL CORPORATION	)	DATE ISSUED: 04/26/2007
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Granting Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Sarah M. Hurley (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Granting Benefits (03-BLA-6139) of Administrative Law Judge Joseph E. Kane rendered on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited the miner with sixteen years of coal mine employment.[1] Decision and Order at 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), (4), 718.203(b). The administrative law judge further found that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that Dr. Caffrey's opinion could not be considered because it exceeded the evidentiary limitations pursuant to 20 C.F.R. §725.414(a)(3). Employer also contends that the administrative law judge erred in finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant[2] responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, contending that the administrative law judge erred by excluding the portions of Dr. Caffrey's report that constitute autopsy evidence. Employer has filed reply briefs to both claimant's and Director's responses, reiterating its contentions. Claimant has filed a surreply to employer's reply brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge erred in finding that Dr. Caffrey's report exceeded the limits on employer's evidence pursuant to 20 C.F.R.

[1] The record indicates that the miner's coal mine employment occurred in Kentucky. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc).*

[2] Claimant is the miner's widow. The miner died on October 30, 2001. Director's Exhibit 10. Claimant filed this survivor's claim for benefits on January 15, 2002. Director's Exhibit 3. The district director awarded benefits in a proposed decision and order issued on March 19, 2003. Director's Exhibit 13. Employer requested a formal hearing before the Office of Administrative Law Judges. Director's Exhibit 30.

§725.414(a).[3] With respect to the specific evidentiary issues raised on appeal, 20 C.F.R. §725.414 limited employer to "no more than one report of an autopsy…and no more than two medical reports" in its affirmative case. 20 C.F.R. §725.414(a)(3)(i). In "rebuttal of the case presented by the claimant," employer could submit "no more than one physician's interpretation of each…autopsy…submitted by the claimant…." 20 C.F.R. §725.414(a)(3)(ii). Employer designated the reports of Drs. Fino and Tomashefski as its two affirmative-case medical reports. Additionally, employer designated an October 31, 2002 report, in which Dr. Caffrey reviewed the autopsy report and slides and medical records, as its affirmative-case autopsy report. Employer further designated a supplemental report of February 11, 2004, in which Dr. Caffrey reviewed additional medical records and critiqued a supplemental report by the autopsy prosector, as employer's "rehabilitative" autopsy evidence under 20 C.F.R. §725.414(a)(3)(ii).[4]

In his May 17, 2006 Order to Show Cause, the administrative law judge ruled that only the original prosector's report is considered a "report of an autopsy" under the

[3] Section 725.414, in conjunction with 20 C.F.R. §725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). The claimant and the party opposing entitlement may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id*. "Notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

[4] Review of 20 C.F.R. §725.414(a)(3)(ii) does not disclose a "rehabilitative" autopsy evidence category. On appeal, employer states that Dr. Caffrey's two reports are intended as either affirmative-case autopsy evidence, or as autopsy rebuttal evidence.

evidentiary limitations at 20 C.F.R. §725.414(a). Thus, the administrative law judge determined that only the report of Dr. Dennis constituted autopsy evidence, because Dr. Dennis conducted the autopsy. The administrative law judge ruled that Dr. Caffrey's opinions constituted additional medical reports, not autopsy reports. The administrative law judge further determined that Dr. Caffrey's opinions exceeded the evidentiary limitations and were not admissible because employer had already designated the reports of Drs. Fino and Tomashefski as its two medical reports. 20 C.F.R. §725.414(a)(3)(i). The administrative law judge further found that because Dr. Caffrey's opinions were excluded, Dr. DeLara's opinion was not admissible as claimant's autopsy rebuttal evidence and that several of claimant's opinions by Dr. Gibson, the physician who signed the death certificate, were extraneous. The administrative law judge instructed the parties to redesignate their evidence in accordance with his rulings.

Accordingly, on May 26, 2006, claimant designated its affirmative evidence as the medical reports of Drs. DeLara and Dennis, designated the report by Dr. Dennis as its autopsy evidence, and also included hospital records and treatment notes. On May 30, 2006, employer redesignated its affirmative evidence as the medical reports of Drs. Fino and Tomashefski, and also included hospital records and treatment notes. The administrative law judge considered only the evidence listed on the revised evidence summary forms. *See* Decision and Order at 3, n. 2.

Employer first contends that 20 C.F.R. §725.414 is an invalid regulation. Specifically, employer argues that 20 C.F. R. §725.414 conflicts with Section 413(b) of the Act, 30 U.S.C. §923(b) and the Administrative Procedure Act, 5 U.S.C. §551 *et seq*, which is incorporated by the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Employer's Brief at 9. The Board has already rejected these arguments, and we therefore reject them in this case. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58 (2004)(*en banc*); *see also Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, --- BLR --- (4th Cir. 2007).

Employer next contends that the administrative law judge should have admitted Dr. Caffrey's opinions as an autopsy report under 20 C.F.R. §725.414(a)(3)(i), or as rebuttal to Dr. Dennis's autopsy report under 20 C.F.R. §725.414(a)(3)(ii). The Director agrees, in part.

In *Keener v. Peerless Eagle Coal Corp.*, BLR , BRB No. 05-1008 BLA (Jan. 26, 2007)(*en banc*), the Board held that "in light of the comments to the regulations and the practical concerns surrounding the requirement for a detailed macroscopic description of the lungs," a physician's review of a miner's autopsy slides could constitute an affirmative report of an autopsy pursuant to 20 C.F.R. §725.414(a)(3)(i). *Keener*, slip op. at 6. Consequently, in this case, we hold that the administrative law judge erred in

finding that Dr. Caffrey's October 31, 2002 report could not constitute an "autopsy report" for purposes of the evidentiary limitations at 20 C.F.R. §725.414.

The Director contends that Dr. Caffrey's report, in addition to being an "autopsy report" for purposes of the evidentiary limitations, also constitutes a "medical report," since Dr. Caffrey reviewed the medical evidence as well as autopsy slides. Consequently, the Director urges that the Board reject employer's contention that the entire report is admissible, but should allow the employer to submit that portion of Dr. Caffrey's report that constitutes a review of the autopsy slides and the prosector's gross examination report.

Employer deleted reference to Dr. Caffrey's report based on the administrative law judge's erroneous evidentiary ruling that no portion of Dr. Caffrey's report could constitute an autopsy report for purposes of the evidentiary limitations. Employer is entitled to have an opportunity to select its affirmative and rebuttal evidence.[5] Consequently, we vacate the administrative law judge's Order dated May 17, 2006. On remand, the administrative law judge is instructed to allow employer to designate the autopsy report that it wishes to submit in support of its affirmative case as well as its two affirmative-case medical reports. The administrative law judge is further instructed to allow employer to designate which physician's interpretation of claimant's autopsy evidence it wishes to submit as rebuttal evidence. On remand, the administrative law judge should consider the Director's argument that Dr. Caffrey's reports also constitute "medical reports" within the meaning of 20 C.F.R. §725.414(a)(3)(i). If, on remand, the administrative law judge determines that Dr. Caffrey's reports exceed the scope of an autopsy report, the administrative law judge has the discretion to determine how to proceed, including admitting the reports in part. *See Keener,* BLR , slip. op. at 10 n. 15; *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108-09 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting).

In light of our decision to remand the case to the administrative law judge to reconsider which evidence is admissible in this survivor's claim, we also vacate the administrative law judge's findings that the evidence establishes the existence of pneumoconiosis and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.205(c). On remand, the administrative law judge is instructed

[5] Section 725.456(b)(1) provides that medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1). Thus, if a party wishes to submit evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414, it is required to make a showing of "good cause" for its submission. *See Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006).

that he must provide an adequate rationale for deferring to the autopsy prosector's opinion over those of reviewing physicians on the issue of whether the miner's death was due to pneumoconiosis, if he again credits the prosector. *See Urgolites v. BethEnergy Mines*, 17 BLR 1-20, 1-22-23 (1992); *see also Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000).

Accordingly, the administrative law judge's Decision and Order-Granting Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge